IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 31836

STATE OF IDAHO,	)	**2006 Opinion No. 10**
	)	
Plaintiff-Respondent,	)	**Filed: February 2, 2006**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
FRED K. HUFFMAN,	)	
	)	
Defendant-Appellant.	)	
	)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Twin Falls County. Hon. G. Richard Bevan, District Judge.

Order of the district court denying I.C.R. 35 motion for reduction of sentence, affirmed.

Molly J. Huskey, State Appellate Public Defender; Diane M. Walker, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Judge

After absconding from parole, Fred K. Huffman attempted to rob one bank, successfully robbed another bank and then fled to Nevada. Huffman was charged with and pled guilty to burglary, I.C. § 18-1401 and grand theft, I.C. §§ 18-2403, 18-2407, and was sentenced to a unified term of ten years, with six years determinate for burglary and to a concurrent unified term of fourteen years, with eight years determinate, for grand theft. Huffman filed an I.C.R. 35 motion for reduction of his sentences, which the district court denied. Huffman appeals, contending that the district court abused its discretion by denying his Rule 35 motion and claiming that special circumstances exist requiring consideration of more than the determinate portion of his sentence.

A motion for reduction of a sentence under I.C.R. 35 is essentially a plea for leniency, addressed to the sound discretion of the court. *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66,

67 (Ct. App. 1989). In conducting our review of the grant or denial of a Rule 35 motion, we consider the entire record and apply the same criteria used for determining the reasonableness of the original sentence. *State v. Forde*, 113 Idaho 21, 22, 740 P.2d 63, 64 (Ct. App. 1987); *State v. Lopez*, 106 Idaho 447, 450, 680 P.2d 869, 872 (Ct. App. 1984).

Sentencing is a matter for the trial court's discretion. Both our standard of review and the factors to be considered in evaluating the reasonableness of the sentence are well established and need not be repeated here. *See State v. Hernandez*, 121 Idaho 114, 117-18, 822 P.2d 1011, 1014-15 (Ct. App. 1991); *State v. Lopez*, 106 Idaho 447, 449-51, 680 P.2d 869, 871-73 (Ct. App. 1984); *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). When reviewing a sentence imposed under the Uniform Sentencing Act, we treat the minimum period of incarceration as the probable duration of confinement. I.C. § 19-2513; *State v. Sanchez*, 115 Idaho 776, 777, 769 P.2d 1148, 1149 (Ct. App. 1989). By focusing on this period, we do not wholly disregard the aggregate length of the sentence, but we recognize that a defendant will be eligible for parole at that time. *Id.* The indeterminate portion of a sentence will be examined on appeal only if the defendant shows that special circumstances require consideration of more than the fixed period of confinement. *State v. Bayles*, 131 Idaho 624, 628, 962 P.2d 395, 399 (Ct. App. 1998); *State v. Herrera*, 130 Idaho 839, 840, 949 P.2d 226, 227 (Ct. App. 1997).

Huffman argues that, because the Commission of Pardons and Parole has determined in unrelated cases that Huffman is to be considered unsupervisable and ineligible for parole in the future, his appeal presents a special circumstance in which this Court should review the indeterminate term. The Commission, acting in the unrelated cases, adopted the parole hearing officer's recommendation that Huffman never again be granted the privilege of parole release. However, in this case, Huffman has yet to go before the parole board because he has not served the determinate term. This Court recently held that the presumption that the determinate term is the "probable measure of confinement" is rebutted when a defendant has served the determinate term and parole has been denied. *State v. Casper*, Docket No. 31770 (Ct. App. Jan. 26, 2006). Only after the presumption is rebutted, are we able to consider whether special circumstances exist warranting review of the indeterminate term. *Id.* That is not the case herein because Huffman has yet to complete his determinate term. Therefore, our standard of review requires that we focus upon Huffman's determinate term as the probable term of confinement.

Huffman, near or at age fifty, with these latest convictions for burglary and grand theft, has accumulated six felony convictions. These most recent offenses were committed after Huffman absconded from parole. Huffman's other felony convictions include a robbery conviction and another grand theft conviction. The sentences in this case were ordered to run concurrently with each other, and with Huffman's pre-existing sentences. Taking into account Huffman's felony record, along with all the facts and circumstances in this case, we conclude that the district court did not abuse its discretion by denying Huffman's Rule 35 motion for reduction of sentence. Accordingly, the order of the district court denying Huffman's Rule 35 motion is affirmed.

Chief Judge PERRY **CONCURS**.

Judge LANSING, **CONCURRING IN THE RESULT**

Although I agree that Huffman's sentences should be affirmed on appeal, I disagree with the majority's position that Huffman has not demonstrated special circumstances that warrant review of the indeterminate portion of his sentence.

When Huffman filed an Idaho Criminal Rule 35 motion for reduction of his sentences in this case, he supported the motion with the minutes of proceedings of the Commission of Pardons and Parole, in which his parole in a prior case was revoked. The document includes a hearing officer's recommendation for revocation of parole and the further recommendation "that the subject never again be granted the privilege of parole relief. I recommend that he be required to serve his sentences to their full-term release dates." The Commission approved the hearing officer's findings and, in addition to revoking Huffman's parole, passed him to his full-term release date. In doing so, the Commission stated that it "considered [Huffman] to be unsupervisable." Although this parole proceeding did not concern the sentence in the case before us, but was on a different felony conviction, in my view the Commission's strong expression that Huffman was unsupervisable and its adoption of the referee's recommendation that he "never again be granted the privilege of parole relief," is sufficient to rebut our general presumption that the determinate term of a sentence is the probable duration of confinement. It is also sufficient to show a probability that Huffman will remain imprisoned through his entire unified sentence in the present case.

In our recent opinion in *State v. Casper*, Docket No. 31770 (Ct. App. Jan. 26, 2006), we held that a defendant who had already served his full fixed term and had been denied parole prior

to his appeal had overcome the usual presumption, but that his indeterminate term remained unreviewable on appeal because it was "impossible to predict, as a probability, any particular term of years that Casper may actually serve." The present case differs from *Casper* because Huffman has not only rebutted the presumption that he will be released at the end of his fixed term, but has also shown that his probable term of confinement will include his full indeterminate term. Although it remains within the Commission's power to reconsider its conclusion that Huffman should never be paroled--so that one cannot say with certainty that he will serve the entire sentence--such certainty could never be demonstrated by a defendant and ought not be the standard for demonstration of a special circumstance calling for appellate review of the indeterminate portion of a sentence.

It is the majority's position that a special circumstance can never be shown unless the defendant has already served the determinate term and has been denied parole. That approach inherently limits even the possibility of appellate review of an indeterminate sentence to cases where the defendant has received a comparatively short determinate term that can be completed before the trial court acts on a Rule 35 motion or, at the very least, before an appeal is completed. Because people with shorter determinate terms are, as a general proposition, also likely to have comparatively moderate indeterminate terms, the majority's approach limits review of indeterminate sentences to those who are likely to need it least, while categorically eliminating the possibility of review of an indeterminate sentence, no matter how capricious or unjustifiable it may be, if the sentence also includes a determinate term of sufficient length that it cannot be completed before an appeal is presented.

Because Huffman has shown the requisite special circumstance, this Court should conduct an appellate review of the indeterminate term to determine whether it is excessive. Having considered that question, I conclude that the sentence should be affirmed. For the reasons stated by the majority in holding that the determinate portion of Huffman's sentence is reasonable, I conclude that the indeterminate term is reasonable as well. In light of the nature of the offenses in this case and his extensive criminal record, fourteen years of incarceration is not excessive. Therefore, although I disagree with the majority's refusal to consider the indeterminate term, I join in the majority's conclusion that the sentence should be affirmed.